

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : Docket #23-mj-06612

Plaintiff, :

-against- :

THOMAS ALEXANDER BRANDENSTEIN, : New York, New York
October 2, 2023
Defendant.

-----:

PROCEEDINGS BEFORE
THE HONORABLE STEWART D. AARON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
BY: MITZI STEINER, ESQ.
1 St. Andrew's Plaza
New York, New York 10007

For Defendant: FEDERAL DEFENDERS OF NEW YORK
BY: SYLVIE J. LEVINE, ESQ.
52 Duane Street, 10th Floor
New York, New York 10007

Transcription Service: Marissa Mignano Transcription
Phone: (631) 813-9335
E-mail:marissamignano@gmail.com

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E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
None				

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

1 THE DEPUTY CLERK: This is in the matter of
2 the United States versus Thomas Alexander
3 Brandenstein, Case Number 23-mag-6612.

4 Counsels, please state your appearances for
5 the record.

6 MS. STEINER: Good afternoon, Your Honor.
7 Mitzi Steiner for the Government. And I'm
8 accompanied at counsel's table by Special Agent
9 Sean Quinn from HSI.

10 THE COURT: Hi. Good afternoon.

11 MS. LEVINE: Good afternoon. The Federal
12 Defenders of New York by Sylvie Levine on behalf of
13 Mr. Brandenstein.

14 THE COURT: Good afternoon.

15 May I please have the date and time of
16 arrest?

17 MS. STEINER: Yes, Your Honor. The
18 defendant was arrested on Friday, September 29th, at
19 approximately 11:45 p.m. He waived presentment
20 until today.

21 THE COURT: Mr. Brandenstein, I'm
22 Magistrate Judge Aaron. Are you able to understand
23 me through the interpreter?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You are here because you're

1 charged with certain crimes by a complaint. The
2 purpose of today's proceeding is to advise you of
3 certain rights that you have, to inform you of the
4 charges against you, to consider whether counsel
5 should be appointed for you, and decide under what
6 conditions, if any, you should be released pending
7 trial.

8 Now, I'm going to explain certain
9 constitutional rights that you have. You have the
10 right to remain silent. You're not required to make
11 any statements. Even if you've already made
12 statements to the authorities, you do not need to
13 make any further statements. Any statements you do
14 make can be used against you.

15 You have the right to be released, either
16 conditionally or unconditionally, pending trial,
17 unless I find there are no conditions that would
18 reasonably assure your presence at future court
19 appearances and the safety of the community.

20 If you're not a United States citizen, you
21 have the right to request that a government attorney
22 or a law enforcement official notify a consular
23 officer from your country of origin you've been
24 arrested. In some cases, a treaty or other
25 agreement may require the United States Government

1 to give that notice whether you requested it or not.

2 You have the right to be represented by an
3 attorney during all court proceedings, including
4 this one, and during all questioning by the
5 authorities. You have the right to hire your own
6 attorney. If you cannot afford an attorney, I will
7 appoint one today to represent you.

8 Do you understand those rights as I've just
9 explained them?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: So I have before me a financial
12 affidavit indicating that you would like for me to
13 appoint Ms. Levine as your counsel. Am I correct?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you signed this financial
16 affidavit?

17 If I could ask you to please raise your
18 right hand. Do you swear that the contents of this
19 affidavit are true and correct, so help you God?

20 THE DEFENDANT: Yes, I swear.

21 THE COURT: All right. Based upon the
22 contents of the affidavit, I am approving the
23 appointment of Ms. Levine as your counsel and
24 affixing my signature to reflect that.

25 I have before me a complaint that charges

1 you, Mr. Brandenstein, with one count of coercion
2 and enticement of a minor and one count of travel
3 with intent to engage in illicit sexual conduct.

4 Let me ask, Ms. Levine, have you had an
5 opportunity to review the charges in the complaint
6 with your client?

7 MS. LEVINE: Yes, Your Honor, we have.

8 THE COURT: And do you waive its public
9 reading?

10 MS. LEVINE: We do.

11 THE COURT: Mr. Brandenstein, you have the
12 right to a preliminary hearing at which the
13 Government will have the burden of showing that
14 there's probable cause to believe that the crime for
15 which you're being charged has been committed and
16 you're the person who committed it. At the hearing,
17 you or your counsel would be entitled to
18 cross-examine witnesses and introduce evidence.
19 However, a preliminary hearing will not be held if
20 you're indicted by a grand jury before the date of a
21 preliminary hearing. I will set the preliminary
22 hearing date at the conclusion of these proceedings.

23 I'll next hear from the Government with
24 respect to its position on bail, detention or
25 release.

1 MS. STEINER: Your Honor, the Government is
2 seeking detention in this case on both risk of
3 flight and dangerousness.

4 THE COURT: And, Ms. Levine, I assume
5 you'll be contesting?

6 MS. LEVINE: That's correct.

7 THE COURT: All right. So let me first
8 hear from the Government with respect to
9 articulating its reasons for seeking detention on
10 those two grounds, and then, of course, I'll hear
11 from defense counsel in opposition, for lack of a
12 better term.

13 MS. STEINER: Thank you, Your Honor. I'll
14 note from the start that there is a presumption of
15 detention in this case under 18 U.S.C. 3142(e)(3)(E)
16 on both counts that have been charged in the
17 complaint.

18 THE COURT: Just give me a second, please.
19 Could you restate the statutory provision for me?

20 MS. STEINER: Of course, Your Honor. It's
21 18 U.S.C. 3142(e)(3)(E).

22 THE COURT: Okay. Ms. Levine, do you agree
23 that it is a presumption case?

24 MS. LEVINE: Yes, Your Honor.

25 THE COURT: Okay. Thank you. Please

1 proceed.

2 MS. STEINER: Thank you, Your Honor. In
3 addition to this being a presumption case as to both
4 counts, the conduct here, as alleged in the
5 complaint, clearly warrants detention. And I want
6 to provide Your Honor with a brief summary of the
7 conduct. I don't want to get into every detail
8 because that is laid out in the complaint.

9 But for sake of background, the conduct in
10 this case began in March of 2023 when this defendant
11 began having extensive communications with a minor
12 victim who was then only 15 years of age. And the
13 defendant essentially groomed this victim over a
14 period of several months by sending communications
15 to the victim in which he professed love for the
16 victim, essentially encouraged the victim to believe
17 that he was in a relationship with the defendant.
18 And those messages became increasingly sexually
19 explicit and sexual in nature, including, among
20 other things -- and, again, it's laid out in more
21 detail in the complaint -- images of the defendant's
22 genitalia, images of the defendant masturbating,
23 among many other things.

24 In June -- and I should note before I
25 continue, Your Honor, the defendant, although this

1 is a two-defendant complaint, was clearly the driver
2 of those communications. It was he and he alone
3 that was in direct communication with the victim and
4 was the primary actor in that scheme of enticing the
5 victim at that point in time.

6 The defendant and his codefendant, the
7 defendant's partner, then arranged to fly from their
8 residence in Berlin, Germany, to the United States
9 with the purpose of having a sexual encounter with
10 the victim. They both were in direct communication
11 with the victim leading up to, and then during their
12 travels. And it was very clear from their text
13 communications that the purpose of their travels was
14 again to engage in this illicit sexual conduct.

15 When the defendant and his codefendant then
16 arrived in the United States, they came to the
17 jurisdiction. The defendant rented a hotel room
18 under his name in Manhattan for a period of several
19 days, and there's video surveillance footage of the
20 defendant accompanying the minor victim in the
21 immediate proximity of that room. And the
22 Government then subsequently recovered several
23 images and videos from a device at the victim's
24 residence which shows exactly what took place in
25 that room, which is incredibly disturbing and sad.

1 What happened in that room is that the defendant and
2 his codefendant engaged in a series of sex acts
3 with, again, this 15-year-old minor victim, which
4 were not only encouraged and initiated, but, also,
5 these sex acts were recorded.

6 The defendant then left the jurisdiction
7 with his codefendant shortly thereafter and returned
8 for the first time since that point in time this
9 past Friday.

10 There is an extreme risk of flight in this
11 case, and I don't use that term lightly. The
12 defendant has no legal status here. His husband,
13 family, all of his connections are in Berlin,
14 Germany. He's had, as Pretrial notes, extensive
15 travel during the last several years. As noted, he
16 is a citizen only of Germany. And Germany notably,
17 and the Government has confirmed this with DOJ
18 headquarters, has no extradition policy with the
19 United States. So were the defendant to return to
20 Germany, the Government would have no way of getting
21 him back to the United States for purposes of this
22 prosecution.

23 The defendant also has extensive reasons
24 for fleeing. He is currently looking, under
25 Count One, at a mandatory minimum sentence of

1 ten years. And as the Government has conveyed to
2 defense counsel, the Government's investigation is
3 robust and ongoing. It seized two devices from the
4 defendant at the time of his arrest on Friday. It
5 intends to seek warrants on both of those devices
6 and to continue to investigate its case, expecting
7 that, for example, a production charge for the
8 recording of those sex acts with the victims may
9 very well be likely by the evidence that is
10 uncovered during the course of the Government's
11 investigation once it has additional time to develop
12 that evidence.

13 So the risk here of the defendant fleeing
14 is extremely high because he has every reason to
15 flee, given the charges that he faces here, and his
16 entire life is in Germany. The United States would
17 have no way of bringing him back here, as I said,
18 for purposes of prosecution.

19 The risk of danger here, Your Honor, is
20 also very significant. The last time the defendant
21 was in this jurisdiction, it was for the sole
22 purpose of engaging in sex acts with a minor victim.
23 He was able to do that at the time. He had a Visa.
24 He entered the jurisdiction, reserved a hotel room
25 for the purpose, again, of committing those crimes

1 with that minor victim. And, now, as I've read in
2 the Pretrial Services report, is requesting that the
3 Court return him to a hotel room in Manhattan where,
4 presumably, there would be very little to prevent
5 him from engaging in the same type of criminal
6 conduct that he previously did only as recently as
7 July. And it's particularly disturbing, Your Honor,
8 that the defendant is flying back to the same
9 jurisdiction where he last engaged in these sex
10 acts. And while the Government doesn't have direct
11 evidence of the purpose of his trip, I think it can
12 be inferred or presumed that there may have been a
13 risk, if not for his arrest, that he would have
14 engaged in additional criminal activity.

15 So the danger to the community here is also
16 very significant. And I think that the
17 recommendations here from Pretrial -- although, I
18 recognize they're trying to put forth a robust
19 package here of supervision -- is just not
20 sufficient. I mean, GPS monitoring for an
21 individual who, again, committed sex acts previously
22 at the same similar location would not give the
23 Government any confidence that Pretrial would
24 actually be able to prevent similar criminal conduct
25 in the future.

1 And finally, Your Honor, I would just point
2 Your Honor to the factors to be considered under the
3 Bail Reform Act. And I'm looking now to 18 U.S.C.
4 3142(g). I'll just go through them quickly because
5 I think each of them overwhelmingly support
6 detention in this case. So the nature and
7 circumstances of the offense charged, incredibly
8 egregious, disturbing conduct; the weight of the
9 evidence against the person. Again, Your Honor,
10 there's direct text communications, there's a hotel
11 surveillance footage, and then there's a recording
12 of sex acts with the minor victim and the defendant
13 appearing nude, and the codefendant engaged in a
14 direct sex act with the victim. The history and
15 characteristics of this individual. I'll not,
16 Your Honor, that it's been difficult for the
17 Government to pull the criminal history of this
18 individual, given that he is a foreign national;
19 although, we're endeavoring to do so. But I think
20 the fact that the defendant engaged in this grooming
21 behavior and enticement over a period of several
22 months, Your Honor, can take to infer about the
23 character of this individual. And, finally, the
24 nature and seriousness of the danger to any person
25 or the community.

1 And I won't belabor the point, Your Honor,
2 but as I've stated it's clearly, the Government's
3 position that this individual poses a real and
4 present danger to the community if not for his
5 incarceration. So for all of those reasons,
6 Your Honor, the Government would seek detention on
7 these facts in this case for this defendant.

8 THE COURT: Ms. Levine.

9 MS. LEVINE: Thank you, Your Honor. The
10 person sitting before you is a 57-year-old with no
11 criminal record. The Government knew about this
12 conduct. It issued a criminal complaint. It issued
13 an arrest warrant. If he had any criminal record,
14 they would have brought it before you. He has
15 absolutely none.

16 And it is against that background that I
17 would like to propose a bail package. Lots of
18 people on these charges -- and these are obviously
19 serious charges -- lots of people on these charges
20 in this district get bail. I think they often get
21 bail on consent if they are US citizens. And, of
22 course, Mr. Brandenstein is not a US citizen, but
23 that is not dispositive in the Court's determination
24 about bail.

25 Of course -- and the Government, I'm sure,

1 will confirm this -- when he was arrested -- first
2 of all, he got on the airplane to JFK voluntarily,
3 of his own free will. When he was there, I
4 understand from the agents that Customs and Border
5 Patrol seized his passport. It's in the possession
6 of the Government. He does not have it. He cannot
7 travel back to Germany. He cannot travel anywhere.
8 And so our proposal is that he be released on a GPS
9 ankle monitor.

10 Now, this is a tough case for me, frankly,
11 because he doesn't have real ties to the city. But
12 that doesn't mean that someone can't get bail. It
13 means that we can set up ties. We can set up a
14 physical tie in the form of a GPS bracelet; at which
15 point, Pretrial Services will know where he is all
16 the time. He has a hotel reservation that's been
17 paid for. He could go to that hotel. Contrary to
18 the Government's arguments, there's nothing about
19 hotels that are inherently dangerous. He obviously
20 is not permitted to engage in any of this conduct.
21 They have his passport. They have his devices.
22 There's nothing about going to a hotel that makes
23 this conduct more or less likely. And he would have
24 to set up some additional ties. He would have to
25 literally find a place to live.

1 As Your Honor knows from his financial
2 affidavit and from the financial information he
3 provided to Pretrial, while he qualifies for
4 appointed counsel, he is not without any funds,
5 which, of course, is not the standard for counsel,
6 but he has some income. And I should say he has
7 some savings, which would enable him to rent a room
8 in the Southern or Eastern Districts of New York for
9 the number of months that this case was pending.
10 And a GPS monitor would watch him the whole time.
11 Pretrial Services, as directed, would monitor him
12 the whole time.

13 He has absolutely no other red flags, no
14 history of drug use, or anything else that would
15 make it unlikely that he could comply. He's a
16 working person. He's worked his whole adult life.
17 And as I said, he has absolutely no criminal record.

18 Now, I have to talk for just a minute about
19 these charges because I actually think that legally
20 they're kind of interesting. So this is obviously a
21 serious charge, and the penalties for it are
22 obviously extremely serious here in the federal
23 system. But what makes it subject to federal
24 jurisdiction is the use of interstate communication
25 devices, essentially. Right? That's what makes it

1 federal. And the way that 2422 is written,
2 basically what it criminalizes in Section B is the
3 enticement of a minor to engage in a criminal
4 offense. So in other words, you have the
5 international component, you have the enticement
6 component, and then you have to have a criminal
7 offense component. And I haven't dug really deeply
8 yet into the three offenses that the Government
9 mentions at the bottom of -- on page 1 of the
10 complaint, where it's three New York Penal Law
11 sections that are cited. The first two, 130.25 and
12 130.40, those are E nonviolent felonies in the State
13 of New York. And 130.55 is a B misdemeanor.

14 And in an interesting twist, two of those
15 three are not crimes -- if there is just a sexual
16 act and it involves a minor, they are not crimes.
17 You need an additional factor. You need, for
18 example, physical threat. You need violence. You
19 need a lack of consent. You need a weapon. And, of
20 course, none of those things are present here.

21 So I'm not saying these charges are not
22 serious. I'm not saying the penalties aren't
23 serious. I'm not even saying that they cannot
24 possibly be made out at trial. I'm saying that
25 based on my review of the complaint, there is

1 absolutely nothing about those aggravating factors I
2 just mentioned: An act of violence, an act of
3 physical threat, an act of physical coercion. I
4 understand the Government is saying there's some
5 kind of emotional coercion that perhaps took place,
6 but I don't think that is criminalized by the State
7 sex statutes. So this is all to say -- at least two
8 of them, I should say. I think the third is harder
9 for us. But this is just to say that in
10 distinguishing this case from others, those missing
11 pieces I do think are relevant to the Court's
12 determination.

13 And I'm not here to make arguments about
14 the morality of sex with teenagers. I'm going to
15 leave that for another day. But I do think it is
16 relevant that it is only partially criminalized by
17 New York State. It's not at all criminalized in
18 Germany. And for these reasons, a 57-year-old with
19 no criminal record should be released. And we
20 shouldn't penalize someone for simply not being a US
21 citizen. That would be an improper use of the Bail
22 Reform Act. It can't be that any citizen of another
23 country doesn't get bail. And, in fact, Your Honor
24 knows from sitting here, lots of people who are
25 citizens of other countries do get bail.

1 Admittedly, this is going to require a
2 little creativity in terms of a residence, but it's
3 eminently doable considering the fact that he has
4 some funds and he, consistent with his lifetime of
5 not having encounters with the criminal justice
6 system and with working, there's no reason to think
7 he couldn't get an apartment and stay in this
8 district the whole time monitored by a GPS.

9 THE COURT: Any rebuttal, for lack of a
10 better term, from the Government?

11 MS. STEINER: Your Honor, I'll just note
12 briefly for the record that New York Penal Law
13 130.25 is rape in the third degree; 130.40 is
14 criminal sex act in the third degree; 130.55 is sex
15 abuse in the third degree. I think the defense
16 counsel here didn't want to opine on the morality of
17 sex with a teenager, here a 15-year-old. I think
18 the case law is clear that, again, the evidence here
19 is strong, would clearly make out Count One, which
20 is the most significant offense here.

21 Under Count One, the Government would not
22 need to prove at trial that the defendant even
23 completed a sex act with the minor, only that he
24 attempted to do so. And so I don't know if I fully
25 followed defense counsel's argument, but I think

1 that the weight of the evidence here and, again, the
2 conduct would all speak to real danger and risk of
3 flight associated with the severity of these
4 offenses.

5 MS. LEVINE: Sorry. Just on that, the
6 Government's right about the titles of those
7 statutes. It doesn't change the fact that rape in
8 the third degree is an E nonviolent felony in
9 New York State. Criminal sexual act in the third
10 degree is an E nonviolent felony in the State, and
11 sex abuse in the third degree is a B misdemeanor.

12 If the Government didn't follow the
13 argument, I want to make sure the Court did. At
14 least two of these statutes, it is not a violation
15 of those statutes if you simply have sexual
16 encounters with a minor. There has to be something
17 additional, like violence, force, a weapon, et
18 cetera. That's what I'm saying, that it's not
19 enough to read the titles of the statutes. You have
20 to read all the elements, and two of them, at least,
21 require more.

22 THE COURT: But the third does not?

23 MS. LEVINE: I think the third is a much
24 harder question for us, to be perfectly candid, but
25 that is still an E nonviolent felony. And for all

1 of the reasons that I mentioned, given his lack of a
2 record, his age, his life as a working person, we
3 ask that the Court impose Pretrial Services'
4 recommendation. They recommend a bail package here,
5 and we suggest the Court do the same.

6 THE COURT: All right. I'm going to take a
7 brief recess. I'll ask Pretrial Services to join me
8 in the back.

9 (Recess.)

10 THE COURT: Mr. Brandenstein, I'm required
11 under the law to release you either with or without
12 conditions imposed unless I determine there are no
13 conditions that will reasonably assure your
14 appearance in court as required and the safety of
15 the community.

16 In making a bail determination, I'm
17 required to consider the following factors: The
18 nature and circumstance of the offense charged, the
19 weight of the evidence against you, your history and
20 characteristics, and the nature and seriousness of
21 the danger to any person of the community that would
22 be posed by your release.

23 You heard a discussion about presumptions,
24 and under the Statute 18 U.S.C. 3142(e)(2)(E),
25 there's a presumption given the type of crime that's

1 involved in favor of detention. It is a rebuttable
2 presumption and the Government ultimately bears the
3 burden of establishing by clear and convincing
4 evidence that you're a danger to the community or
5 establishing by a preponderance of the evidence that
6 you're a flight risk. And my determination here
7 basically rests on the presumption and it rests on
8 risk of flight. Given that you don't have ties to
9 the United States, your ties are in Germany, given
10 the length of sentence that could be imposed should
11 you be found guilty, the strength of the
12 Government's case, I find that you have not rebutted
13 the presumption. So my decision is to detain based
14 upon risk of flight because I do find that the
15 Government, by a preponderance of the evidence, has
16 established a risk of flight.

17 Ms. Levine, what are your wishes with
18 respect to the preliminary hearing date?

19 MS. LEVINE: We will waive to the 30th day.

20 THE COURT: Kiva, what's 30 days from
21 today?

22 THE DEPUTY CLERK: November 7.

23 THE COURT: November 7th -- sorry, 2nd, you
24 said?

25 THE DEPUTY CLERK: 7th.

1 THE COURT: 7th.

2 All right. Is there anything else from
3 either side?

4 MS. STEINER: Your Honor, I'll just note
5 the record that a consular notification has been
6 made to Germany.

7 THE COURT: Okay. Anything else from the
8 defense?

9 MS. LEVINE: No, Your Honor.

10 THE COURT: All right. We stand adjourned.
11 Thank you.

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C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of UNITED STATES OF AMERICA v. THOMAS ALEXANDER BRANDENSTEIN, Docket #1:23-MJ-06612, was prepared using digital transcription software and is a true and accurate record of the proceedings.

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10
11 Signature _____ Marissa Mignano
12 Marissa Mignano

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For more information about the study, please contact Dr. Michael J. Kupferschmidt at (415) 502-2555 or via email at kupferschmidt@ucsf.edu.

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